U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18448027

Date: SEPT. 1, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a swimmer, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. We dismissed the Petitioner's appeal and two subsequent two motions to reconsider. The matter is now before us on a third motion to reconsider. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the latest motion.

I. MOTION REQUIREMENTS

A motion to reconsider must state the reasons for reconsideration and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion.

II. CHRONOLOGY

Ordinarily, a petitioner must file a motion to reconsider no later than 33 days after the date of the decision for which that petitioner seeks reconsideration.[1] But because of delays arising from the COVID-19 emergency, U.S. Citizenship and Immigration Services (USCIS) temporarily expanded the

[1] *See* 8 C.F.R. § 103.5(a)(1)(i) and 103.8(b).

filing window, effective March 30, 2020.[2] USCIS has extended this flexibility several times, including on September 11, 2020, when it extended the flexibility period to January 1, 2021.[3] The September 2020 news release reads, in part:

> In response to the coronavirus (COVID-19) pandemic, U.S. Citizenship and Immigration Services is extending the flexibilities it announced on March 30, 2020, to assist applicants, petitioners, and requestors who are responding to certain:
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> - Requests for Evidence;
> - Continuations to Request Evidence (N-14);
> - Notices of Intent to Deny;
> - Notices of Intent to Revoke;
> - Notices of Intent to Rescind and Notices of Intent to Terminate regional investment centers;
> - Motions to Reopen an N-400 Pursuant to 8 CFR 335.5, Receipt of Derogatory Information After Grant;
> - Filing date requirements for Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA); or
> - Filing date requirements for Form I-290B, Notice of Appeal or Motion.
>
> . . . .
>
> USCIS will consider a response to the above requests and notices received within 60 calendar days after the response due date set in the request or notice before taking any action. Additionally, we will consider a Form N-336 or Form I-290B received up to 60 calendar days from the date of the decision before we take any action.

We dismissed the Petitioner's first motion on the merits on September 24, 2020. The Petitioner filed her second motion 89 days later, on December 22, 2020. At that time, the Petitioner quoted the September 2020 news release, stating it permitted her to file the motion "within 60 calendar days after the response due date."

We dismissed the motion as untimely on April 21, 2021. The Petitioner filed a timely third motion on May 6, 2021, which we will consider here.

III. ANALYSIS

On motion, the Petitioner states that she acted in good faith when she filed her December 2020 motion, because the September 2020 USCIS guidance contains "ambiguous and seemingly contradictory language." Specifically, in filing the December 2020 motion, the Petitioner relied on this passage: "USCIS will consider a response to the above requests and notices received within 60 calendar days after the response due date set in the request or notice before taking any action."

[2] "USCIS Expands Flexibility for Responding to USCIS Requests," https://www.uscis.gov/news/alerts/uscis-expands-flexibility-for-responding-to-uscis-requests (last visited August 31, 2021).

[3] "USCIS Extends Flexibility for Responding to Agency Requests," https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-1 (last visited Aug. 31, 2021).

The Petitioner states that, given the above wording, "[i]t would seem that in addition to allowing up to 60 days from the date of the decision for the submission of Form I-290B, this guidance also provides for 60 days of flexibility from after the response due date set in the request or notice." A motion to reconsider, however, is not a "response" to a "request or notice." However one might interpret the sentence about the "response due date" in isolation, or on first reading, the direct statement that USCIS "will consider a . . . Form I-290B received up to 60 calendar days from the date of the decision" supersedes any ambiguous reading of the sentence that precedes it.

A motion to reconsider must show that the disputed decision was based on an incorrect application of law or USCIS policy. The Petitioner's misreading of USCIS guidance does not show that we based our April 2021 decision on an incorrect application of law or USCIS policy, and therefore the Petitioner's error is not good cause for reconsideration.

The Petitioner also contends that, by accepting the filing fee and issuing a receipt for the December 2020 filing, "the Administrative Appeals Office actionably determined that [the Petitioner's motion] met the *prima facie* regulatory threshold requirements for a motion to reconsider, including that the matter was timely filed." The Petitioner further contends that we failed "to timely notify her of the rejection of the motion." This argument proceeds on an incorrect premise. We did not "reject" the December 2020 filing. We accepted the filing, and then *dismissed* the motion because it was untimely. The regulation at 8 C.F.R. § 103.5(a)(4) states: "A motion that does not meet applicable requirements shall be dismissed." Because timely filing is an applicable requirement (*see* 8 C.F.R. § 103.5(a)(1)(i)), the regulations required us to dismiss the motion. And because our April 2021 decision was a dismissal rather than a rejection, we advised the Petitioner of her right to file a motion on that decision. The Petitioner has exercised that right, and we have accepted the filing, hence the present decision. Therefore, the Petitioner has not been deprived of due process in this proceeding. An error by the Petitioner (or her attorney of record) concerning the filing deadline does not create a due process right to accommodation as though the error had not occurred, or as though the erroneous reading of USCIS policy had been correct.

IV. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reconsideration and has not overcome the grounds for dismissal of the prior motion. We will therefore dismiss the motion to reconsider.

ORDER: The motion to reconsider is dismissed.